IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AUSTIN R. DUTTON, JR. and LINDA G. DUTTON, Husband and Wife,	:	CIVIL ACTION
Plaintiffs,	:	NO. 97-3354
v.	:	
BUCKINGHAM TOWNSHIP, BUCKINGHAM TOWNSHIP BOARD OF SUPERVISORS, BUCKINGHAM TOWNSHIP ZONING HEARING BOARD, BEVERLY C. CURTIN, BUCKINGHAM TOWNSHIP POLICE DEPARTMENT, JEFFERY T. LUKENS and DAFYDD P. JONES	:	
Defendants.	:	

Gawthrop , J. November , 1997

M E M O R A N D U M

Plaintiffs, Austin and Linda Dutton, have filed a nine-count complaint alleging violations of federal civil rights statutes and sundry state laws based upon an allegedly discriminatory zoning ordinance which regulates the operations of a dog kennel on their property. Named as defendants are Buckingham Township, Buckingham Township Board of Supervisors, and Buckingham Township Zoning Hearing Board, as well as individual defendants, Jeffery Lukens and Dafydd Jones, neighbors of the plaintiff, and Beverly Curtin, the Buckingham Township Manager. This court has federal-question jurisdiction. 28 U.S.C. § 1331.

Before the court is the Fed.R.Civ.P. 12(b)(6) Motion to

Dismiss of defendants Lukens and Jones asserting that there is no state action and thus the federal civil rights statutes, 42 U.S.C. §§ 1983, 1985(3), 1986 and 1988, cannot be invoked. Plaintiffs concede that Lukens and Jones are private individuals, but argue that they should be state actors since they acted in conspiracy with the other state-actor defendants. I disagree, and upon the following reasoning, I shall grant the motion to dismiss.

I. **Background**

Plaintiffs, Austin and Linda Dutton, reside on an 11-plus acre property located in Buckingham Township, Bucks County, where they breed rottweiler dogs, which they show in breeding and obedience-trial competitions. Shortly after the Duttons moved onto their property, Lukens and Jones, who were neighbors of the Duttons, prepared a petition, which they signed along with 18 other neighbors, expressing concerns about the dangers posed by the dogs, and asking that the Township Supervisors and Township Manager Beverly Curtin amend the Township zoning ordinances, to abate their canine concerns. Defendants sent Curtin this petition, along with a letter and a proposed zoning amendment.

Plaintiffs allege that the petition and letter included false and defamatory statements, that, together with defendants' strong influence with the Township, caused the Supervisors to enact discriminatory ordinances designed to thwart their dog kennel operations, creating such onerous conditions that they

would have no choice but to sell their property to Lukens. According to plaintiffs, this was all done in a conspiracy among Lukens and Jones and the other defendants.

Plaintiffs aver that the conspiracy was not merely verbal. They say that Lukens dumped a "huge pile of manure laden soil directly on the property line . . . resulting in a horrible odor and flies," and that Lukens held a turkey at the fence to bait plaintiffs' dogs, thereby to videotape the dogs in a state of agitation. (Compl. ¶¶ 49, 73.)

Plaintiffs also aver that Curtin resigned as Buckingham Township Manager and joined Heritage Development Company, an entity that previously negotiated the purchase of the Duttons' property.

II. **Standard of Review**

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of a complaint. See Strum v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). In so doing, the court must "consider only those facts alleged in the complaint and accept all of the allegations as true," ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994), and must view them in the light most favorable to the non-moving party. See Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). Dismissal is appropriate only when it appears that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Conely v. Gibson, 355 U.S. 41, 45-46 (1957). Moreover, in deciding a

motion to dismiss, the district court is "not required to accept legal conclusions either alleged or inferred from the pleaded facts." Kost v. Kokakiewicz, 1 F.3d 176, 183 (3d Cir. 1993).

III. **Discussion**

To state a claim under § 1983, plaintiffs "must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." West v. Atkins, 487 U.S. 42, 48 (citations omitted); 42 U.S.C. § 1983. At issue here is the second requirement of a § 1983 claim, that is, whether Lukens and Jones were acting under color of state law. Even when viewing the factual allegations of the complaint as true and in a light most favorable to plaintiff, I find that the complaint fails to make out the element of state action.

Under Color of State Law

For a non-state party to be deemed acting under color of state law, he or she must be a "willful participant in joint activity with the State or its agent." Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970). This test for determining state action requires a showing of conspiratorial or other concerted action. See Dennis v. Sparks, 449 U.S. 24, 27-28 (1980) (holding that a private party linked to a judge in corrupt conspiracy is deemed a state actor); see also Gilbert v. Feld, 788 F.Supp. 854, 859 (E.D. Pa. 1992) (discussing the conspiracy test for state action).

Although a § 1983 action against a municipality is not subject to heightened pleading standards, Leatherman v. Terrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993), a complaint alleging conspiracy must still "plead with particularity the circumstance of the alleged wrongdoing." Rose v. Bartle, 871 F.2d 331, 366 (3d Cir. 1989)(quoting Kalmanovitz v. G. Heilman Brewing Co., 595 F.Supp. 1385, 1401 (D.Del. 1984)); see also Cap v. Hartman, Civ. No. 95-5871, 1996 WL 266701 at *3 (E.D. Pa. May 9, 1996). Indeed, "[o]nly allegations of conspiracy which are particularized, such as those addressing the period of the conspiracy, the object of the conspiracy, and certain action of the alleged conspirators taken to achieve that purpose will be deemed sufficient . . . ." Id.

Here, plaintiffs repeatedly use the word "conspiracy" in their complaint; however, they do not allege facts sufficient to make that word anything more than a conclusory label. That defendants petitioned the zoning board and that they allegedly disseminated false information about plaintiffs' activities is not enough to infer that a conspiracy existed. See Scott v. Greenville County, 716 F.2d 1409, 1424 (4th Cir. 1983) ("Even overtly biased citizens who write letters, speak up at public meetings, or even express their prejudices in private meetings with public officials without conspiring a joint plan of action are not conspiring with those officials in a way that subjects them to § 1983 liability."); see also Gilbert, 788 F.Supp. at 860 ("A conspiracy cannot exist, for purposes of § 1983, where the

public officials are unaware of the violative nature of their actions due to the misrepresentations of the private parties."). None of the facts defendants alleged leads to the conclusion that an agreement existed among Jones, Lukens, and the Township. See Spencer v. Steinman, 968 F.Supp. 1011, 1020 (E.D. Pa. 1997)("Agreement is the sine qua non of a conspiracy."). Instead, plaintiffs present a scenario in which influential neighbors were able to persuade the Township zoning officers to respond to their concerns. One does, after all, have the right "to petition the Government for a redress of grievances." U.S. CONST. amend. I.

The crux of plaintiffs' allegations is that Lukens and Jones were able to influence the Township; however, influence does not equate with conspiracy. See Culebras Enterprises Corp. v. Rivera Rios, 813 F.2d 506, 519 (1st Cir. 1987)("Something more . . . than simple endorsement and encouragement of legislation that turns out to be unconstitutional is a necessary element of a section 1983 claim based upon a conspiracy theory."). There are also allegations that Lukens and Jones harassed plaintiffs, which may well be violations of state laws, but they do not amount to a conspiracy. In short, there is no basis to infer that defendants' alleged influence and harassment were grounded in a conspiracy. Thus, viewed in terms of conspiracy theory, the § 1983 claim stated against the private-party defendants, Lukens and Jones, is insufficient.